IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO.1 OF 2007
IN
MISC. PETITION NO.64 OF 2000

1. Zenith Steel Tubes & Industries Limited (formerly AVS Industries Ltd.) a Limited Company incorporated and registered under the Companies Act, 1956, having its registered office at 204, Maker Bhavan No.3, New Marine Lines, Mumbai 400 020 and Factory premises at Village Madap, Taluka Khalapur, Dist: Raigad, (b) P.O.Vikramgadh, Dist: Thane.

2. Ganshyamdas Gopaldas Singi, of Mumbai Indian inhabitant, residing at 51, Summer Ville, Off: Bhulabhai Desai Road, Mahalaxmi, Mumbai-400 026. .... Appellants

- Versus -

SICOM Limited,
a Company incorporated and registered under the Companies Act, 1956, having its registered office at 'Nirmal', 1st Floor, Nariman Point, Mumbai-400 021. .... Respondents

Shri S. Ratnakumar Sharma for the Appellants.

Sarvasri Kevic Setalvad with P.V. Shah for the Respondents.

CORAM: R.M.S. KHANDEPARKAR &
Dr. D.Y. CHANDRACHUD, JJ.

DATED: JANUARY 29, 2007

ORAL JUDGMENT (Per R.M.S.Khandeparkar, J.):

1. Admit. The learned Advocate for the respondents waives service. By consent, heard forthwith.

2. The appellants challenge the order dated 25-4-2005 passed in Miscellaneous Petition No.64 of 2000. The contention of the appellants is two-fold. Firstly, that in view of Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 (for short, "SICA"), the proceedings against the appellants could not have been invoked by the respondents and secondly, that the respondents could not have sought to enforce the guarantee unless the assets which are mortgaged in their favour had been realised. Reliance is sought to be placed in the decision of the Apex Court in the matter of **Maharashtra Tubes Ltd. v. State Industrial & Investment Corporation of Maharashtra Ltd. and another,** reported in (1993) 2 SCC 144, **Madalsa International Ltd., Mumbai and others v. Central Bank of India, Bombay,** reported in AIR 1998 Bombay 247, and **Ved Prakash Agarwal v. Rama Petrochemicals Ltd.,** reported in 2004 (4) Bom.C.R. 578 while challenging the impugned order.

The learned Advocate appearing for the respondents has drawn attention to the decision of this Court in **Dewal Singhal v. State of Maharashtra,** reported in 2001 Company Cases Vol.106 page 587 and an unreported decision of a Division Bench of this Court in **Appeal No.205 of 2006 in Misc. Petition No.61 of 2000** {Vinod Kumar M. Gadia & Anr. v. SICOM Limited}, delivered on 18-4-2006. The learned single Judge while passing the impugned order has placed reliance in his Judgment delivered in Misc. Petition No.61 of 2000. The Appeal No.205 of 2006 was filed against the said Judgment in Misc. Petition No.61 of 2000 and it was disposed of by the said order dated 18-4-2006, confirming the Judgment delivered by the learned single Judge in Misc. Petition No.61 of 2000.

3. The appellant No.2 is the guarantor for the appellant No.1 for repayment of loan by the latter to the respondents. On account of default in repayment of loan, in November, 2000 the respondents took out proceedings under Sections 31(1)(aa) and 32 of the State Financial Corporations Act, 1951, hereinafter called as "the said Act". During the pendency of those proceedings, the BIFR by its order dated 23-5-2002 declared the appellant No.1 as a sick industrial company in Reference Case No.131 of 1999. Consequent to the said declaration, objection was sought to be raised

before the learned single Judge in the proceedings under the said Act that in view of Section 22 of SICA the personal guarantee cannot be invoked against the appellant No.2, and secondly, that the guarantee cannot be enforced unless the assets which are mortgaged are realised. Both the contentions were rejected by the impugned order. Hence the appeal.

4. The first point for consideration which arises relates to bar under Section 22 to the proceedings under Section 37(1)(aa) of the said Act. In this regard, the Division Bench of this Court **in Dewal Singhal's** case (supra) had clearly ruled, after taking into consideration the earlier decisions of this Court as well as of the Apex Court, that only "suit" against the guarantor of a loan granted to the industrial company which has been declared as sick under the SICA is barred under Section 22 of the SICA and no other proceedings. In fact, with the said decision, the law is well-settled on this aspect and we do not find any decision, either of this Court or the Apex Court, contrary to the law laid down in that regard in Dewal Singhal's case. The decisions sought to be relied upon by the learned Advocate for the appellants nowhere assists the appellants in the matter in hand. The decision in **Maharashtra Tubes'** case (supra) was prior to the amendment which was introduced to Section 22 of Act 12

of 1994. The decision was delivered on 29-1-1993. The amended provision of Section 22 clearly specifies that no "suit" for recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company shall lie. It does not prohibit any proceeding other than a suit in that regard and the law in that regard has been clearly laid down by the Division Bench of this Court in Dewal Singhal's case. The decision in Maharashtra Tubes' case, therefore, is of no help to the appellants.

5. As far as the decision in **Madalsa International's** case (supra) is concerned, it was in relation to execution proceedings and the Division Bench therein has held that considering the provisions of law, the Court is of the clear opinion that the word "suit" in the amended portion of Section 22 cannot include in its ambit execution or execution proceedings. The decision, rather than assisting the appellants, clearly justifies the order passed by the learned single Judge.

6. The second point for consideration relates to the contention that the guarantee cannot be enforced unless the creditor first proceeds against the mortgaged property. As regards the liability of the guarantor being co-extensive with the principal is also

well-settled and the creditor need not necessarily exercise his right as the mortgagee prior to proceeding against the guarantor to recover the dues is also well-settled by a catena of decisions of the Apex Court {vide: **The Bank of Bihar Ltd., v. Dr. Damodar Prasad and another,** reported in AIR 1969 SC 297 and **State Bank of India v. Messrs. Indexport Registered,** reported in AIR 1992 SC 1740}.

7. As regards the decision in **Patheja Bros. Forgings & Stamping and another v. ICICI Ltd. and others,** reported in (2000) 6 SCC 545, it was in relation to suit against guarantor. The decision of the Division Bench in **Ved Prakash Agarwal's** case (supra) was also in relation to the suit for enforcement of guarantee and not the proceedings of the nature initiated in the matter in hand under Section 31 of the said Act. However, it was also specifically ruled that merely because an industrial company is protected, the guarantor does not get protected automatically.

8. There is absolutely no substance in the appeal. In fact, the main contention of the appellants relates to non-maintainability of the proceedings in view of Section 22. As already seen above, the law on this point is well-settled and considering the same, while the arguments were being heard, on three occasions the

learned Advocate appearing for the appellants was asked as to whether the appellants would like to withdraw the appeal. On all the three occasions, the learned Advocate chose to insist to argue and invite judgment in the matter. Insistence for judgment on the point which is already well-settled by the decision of the Apex Court is nothing but waste of the time of the Court. The learned Advocate was not able to point out any point as such, nor could distinguish the above referred decisions with reference to the facts of the case in hand. In the circumstances, we are constrained to dismiss this appeal with costs of Rs.5,000/-. Order accordingly.

(Dr.D.Y.Chandrachud, J.) (R.M.S.Khandeparkar, J.)

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